FILED

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ROBERT F. WAGNER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. ~~_____~~ 70-322

In the Matter of the Imprisonment of
William B. Warren,

Petitioner.

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

In the Matter of the Imprisonment of
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****

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

The petitioner, William B. Warren, prays that a writ of certiorari issue to review the judgment made by the Superior Court Division, General Court of Justice of Caswell County, entered December 4, 1970, denying habeas corpus to petitioner, which judgment the Supreme Court of North Carolina refused to review by its denial of petition for writ of certiorari entered April 6, 1971.

OPINIONS BELOW

The order of the Superior Court Division of the General Court of Justice of Caswell County, North Carolina, in this case is not reported. A copy of the order is appended to this petition. Petitions for writ of certiorari to review this decision were denied by the North Carolina Court of Appeals and the Supreme Court of North Carolina without opinion. Copies of the

JURISDICTION

The judgment of the Supreme Court of North Carolina denying petition for writ of certiorari to review the judgment denying habeas corpus, was made and entered on April 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257(3).

QUESTION PRESENTED

Whether the parole of a parolee from a state correctional institution can be revoked without notice and hearing, consistent with the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws. . . .

General Statutes of North Carolina:

N.C.G.S. 148-61.1

Revocation of Parole by Board; Conditional or Temporary Revocation.--(a) The Board of Paroles may at any time, in its discretion, revoke the order of parole of any parolee. The time a parolee is at liberty on regular parole shall not be counted as any portion of or part of the time served on his sentence, and if any parolee shall have his parole revoked, he shall thereafter be returned to the penal institution having custodial jurisdiction over him.

(b) The Board of Paroles may, in its discretion, enter an order revoking a parole conditionally or for a temporary period of time. Upon issuing such order of conditional or temporary revocation, such parolee may be arrested without warrant by any peace officer or parole officer. After such conditional or temporary revocation of parole, the parolee shall be held for a reasonable length of time during which the Board of Paroles shall determine whether or not the conditions of said

parole have been violated. If it is determined by the Board of Paroles that the conditions of said parole have been violated, the Board of Paroles may in its discretion revoke the order of parole. If it is determined by the Board of Paroles that there has been no violation of the conditions of said parole, then such parolee or parolled prisoner shall be reinstated upon his original parole.

STATEMENT OF THE CASE

This proceeding arises in the Superior Court Division of the General Court of Justice of Caswell County, North Carolina. Petitioner filed an application for writ of habeas corpus with the Clerk of that Court on October 7, 1970, seeking the release from his confinement by the North Carolina Department of Correction, pursuant to an order of the North Carolina Board of Paroles revoking his parole, on the ground that there had been no notice and hearing in connection with the revocation. Writ of habeas corpus was issued, and the matter was heard in the Superior Court on October 29, 1970. The Court denied habeas corpus in a judgment rendered on December 4, 1970. Petitioner sought review of this judgment by petition for writ of certiorari to the North Carolina Court of Appeals; the Court entered its order on March 2, 1971,

denying the petition. Petitioner further sought review of the judgment by petition for writ of certiorari in the Supreme Court of North Carolina; the Court denied the petition by order entered April 6, 1971. The question presented here, that is the constitutionality of parole revocation without notice and hearing, was timely and properly raised in the Superior Court on the face of petitioner's petition for writ of habeas corpus, and in the North Carolina Court of Appeals and Supreme Court of North Carolina, on the face of petitioner's petitions for writs of certiorari. The Superior Court, in its judgment denying habeas corpus, held that the procedures followed in the revocation of petitioner's parole without notice and hearing were not in violation of the Due Process Clause of the Fourteenth Amendment. The North Carolina Court of Appeals and the Supreme Court of North Carolina, by declining to allow petition for certiorari, did not pass upon the merits of petitioner's constitutional claims. (App., pp. 14-19, hereof)

Petitioner was convicted on June 13, 1969, in the Superior Court of Alamance County, upon his plea of guilty to the charge of embezzlement, and was sentenced to a term of imprisonment of not less than two years, nor more than five years. On December 16, 1969, the North Carolina Board of Paroles issued its certificate of parole to the petitioner, releasing

him to parole supervision in Durham County. (App., p. 14, hereof)

On April 8, 1970, the North Carolina Board of Paroles issued a revocation of petitioner's parole and a warrant for his arrest. Petitioner was not given any notice or warning that a proceeding was pending for the revocation of his parole, nor was any hearing held at which petitioner was given the opportunity to be present, either personally and with counsel, or personally, or through counsel. On April 10, 1970, petitioner was taken into custody in Durham, North Carolina, by parole officer Thomas E. Parrish and two policemen of the City of Durham Police Department, on the authority of the warrant. Petitioner was taken to the Durham County Jail, and subsequently was delivered to the North Carolina Department of Correction. Since the time of his arrest on April 10, 1970, petitioner has been continuing the service of his sentence in the North Carolina Department of Correction. (App., pp. 15-16, hereof; Tr. pp. 2-4, 10-11)

ARGUMENT

The decision below should be reviewed because the Supreme Court of North Carolina has refused to review and reverse a decision of one of the trial tribunals of North Carolina, that decided a federal question of substance not theretofore determined by this Court, and decided

a federal question of substance in a way probably not in accord with applicable decisions of this Court.

The issue raised by this petition for certiorari is whether, consistent with the Fourteenth Amendment to the Constitution of the United States, a parolee may be recommitted to state prison without notice and hearing. The statute providing for revocation of parole, N.C.G.S. 148-61.1, is silent on the subject of notice and hearing. This statute was construed by the Superior Court Division of the General Court of Justice of Caswell County, North Carolina, not to require notice and hearing. There are no decisions of North Carolina appellate courts to the contrary.

"'The fundamental requisite of due process of law is the opportunity to be heard.' ...'at a meaningful time and in a meaningful manner.' ...[T]hese principles require ... timely and adequate notice detailing the reasons for [the action] ..., and an effective opportunity to defend by confronting any adverse witnesses and by presenting [favorable] ... arguments and evidence orally." Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970).

Procedural due process requirements apply to the withdrawal of public assistance benefits, Goldberg v. Kelly, supra, disqualification for unemployment compen-

sation, Sherbert v. Verner, 374 U.S. 398 (1963), denial of tax exemption, Speiser v. Randall, 357 U.S. 513 (1958), and to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551 (1956). Loss of liberty by a parolee is an interest, at least equal in dignity to the interests protected by the foregoing cases. Surely the termination of a parolee's freedom is a condemnation to "suffer grievous loss," Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), which outweighs the State's interest in summary adjudication of the issue of whether the parole conditions have been violated. Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

In Memoa v. Rhay, 389 U.S. 128, 134 (1967), this Court held that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Specifically, the Court applied this rule to probation revocation proceedings. Certainly the right to counsel embraces, and indeed presupposes, the right to a hearing of some kind. The petitioners in that case had been provided with a hearing. The holding of that case should apply to parole revocation, as well as to probation revocation. In Hyser v. Reed, 318 F.2d 225, 236 (D.C. Cir. 1963), Chief Justice (then Circuit Judge) Burger, said,

"The legal proceeding most comparable to revocation of parole is revocation of probation." The similarity of the two proceedings is at once apparent upon comparison of the present facts with those in Mempa v. Rhay. Both cases involve recommitment to prison. Petitioner William B. Warren was given a two to five-year sentence, paroled after six months, and recommitted four months later. Jerry Douglas Mempa, in a parallel pattern, was sentenced to probation on the condition that he first spend thirty days in jail, and four months after completion of the active jail sentence, his probation was revoked, and he was recommitted to the institution. See also, McConnell v. Rhay, 393 U.S. 2 (1968).

Revocation of probation and revocation of parole are both crucial stages of a continuing criminal process, in which substantial rights may be lost. Both equally involve a loss of personal liberty.

The two proceedings are also similar in the nature of the decision that must be made. The decision to revoke parole, as well as the decision to revoke probation, requires two separate determinations. The first determination is whether the person conditionally released has violated a condition of his release; and the second determination is whether, if a violation is found, it warrants revocation of the release. The first, factual and retrospective, is a decision typical of the kind

made at an adjudicatory hearing. Kadish, The Advocate and the Expert--Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 833 (1961); Goldberg v. Kelly, 397 U.S. 254 (1970).

The only difference between the usual probationary revocation proceeding and the usual parole revocation proceeding, is the character of the tribunal making the adjudicatory decision, a court in probation revocation and an administrative agency in parole revocation. Either way, however, a binding determination regarding the liberty of an individual is being made, and for that reason, due process requires a hearing. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Hannah v. Larche, 363 U.S. 420 (1962); Londoner v. Denver, 210 U.S. 373 (1908).

In North Carolina, moreover, revocation of parole works to increase the original sentence. This consequence follows from the provision of N.C.G.S. 148-61.1(a), that, "The time a parolee is at liberty on regular parole shall not be counted as any portion of or part of the time served on his original sentence...." Since "the conditions of parole are a restraint on ... liberty not shared by the public generally," State v. Rhinehart, 267 N.C. 470, 480, 148 S.E.2d 651 (1966), the effect of revocation of parole is to add to the original sentence a punishment consisting of the restraint on liberty for the time

the individual was on parole.

As early as 1909, the Supreme Court of Illinois held that there is a constitutional right to a hearing on revocation of parole. "The term 'due process of law,' however, is not confined to judicial proceedings. It is the same as 'the law of the land,' and extends to every proceeding which may deprive a citizen of life, liberty, or property, whether the process be judicial or administrative or executive in its nature." People v. Strassheim, 90 N.E. 118, 120 (Ill. 1909). Other courts which have decided that parolees are constitutionally entitled to a hearing before parole revocation include Swann v. State, 200 Md. 420, 90 A.2d 690 (1952); and Chase v. Page, 456 P.2d 590 (Okla. Crim. 1969). Parole revocation hearings are required by statute in the federal correctional system. 18 U.S.C.A. 4207. "Twenty-five states and the District of Columbia have statutes that specifically require a hearing upon revocation of parole. Nine state statutes seem to specifically authorize revocation without a hearing. Sixteen state statutes give no indication of whether a hearing is required but in seven of these states the courts have interpreted the statute as not requiring a hearing....In at least three of the states where the statute is silent, however, the courts in cases similar to parole have based a hearing requirement, either expressly or impliedly on the demands of due process."

Rose v. Haskins, 388 F.2d 91, 98, n.4 (6th Cir. 1968) (dissenting opinion of Circuit Judge Celebrezze).

It is no answer to petitioner's complaint that special advantages of informality offset the denial of due process. In In re Gault, 381 U.S. 1 (1967), this Court rejected analogous arguments regarding juvenile court proceedings. The Court observed that "constitutional domestication" would not impair any unique benefits. 381 U.S. 22. Moreover, "procedural regularity ... is a psychological stabilizer; acceptance of law is substantially furthered to the extent that those subject to its rule observe its workings with consistent scrupulous fairness. The inculcation of a similar sense on the part of those subject to the correctional laws tends to further, therefore, the very re-adaptation to the norms of society which it is the ultimate purpose of these laws to achieve." Kadish, The Advocate and the Expert--Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 836 (1961).

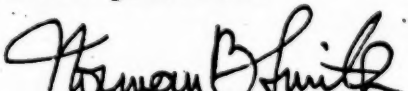
It is also no answer to say that parole is a matter of grace, a privilege and not a right. Some of the most important and far-reaching of this Court's recent constitutional decisions have involved matters which formerly would have been considered "of grace." See Greene v. McElroy, 360 U.S. 474 (1959); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Shapiro

v. Thompson, 394 U.S. 618 (1969).

Of course, the right to a hearing upon parole revocation does not imply a requirement for a full judicial trial. It is not necessary at this time to establish the precise dimensions of a parole revocation hearing. The petitioner, however, has not had a hearing of any kind, and he has not even been advised of the basis for revocation of his parole.

CONCLUSION

It is too late in our constitutional history to permit the Kafkaesque experience of sudden arrest without stated reasons, and incarceration without notice and hearing. No legitimate need of the State demands such a deviation from principles of fairness to the individual, in the context of revocation of parole. Certainly, the magnitude of the consequences to the parolee require that he be accorded the basic procedural rights of notice and hearing. It is respectfully submitted that this petition for Writ of Certiorari should be granted.



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APPENDIX TO PETITION

NORTH CAROLINA
CASWELL COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 2485

IN THE MATTER OF THE)
IMPRISONMENT OF)
WILLIAM B. WARREN)

J U D G M E N T

THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding on the 29th day of October, 1970, in the Caswell County Superior Court, upon an Application for Writ of Habeas Corpus filed with the Clerk of Court for Caswell County on October 7, 1970; and

IT APPEARING TO THE COURT AND THE COURT FINDING THE FOLLOWING FACTS:

That Petitioner was convicted on June 13, 1969, in the Alamance County Superior Court, while represented by John Zanthos, Esquire, of the offense of embezzlement and was sentenced by the Honorable Edward B. Clark, Judge Presiding, to a term of not less than two nor more than five years; that on December 16, 1969, the North Carolina Board of Paroles issued its Certificate of Parole to the Petitioner paroling him to parole supervision in Durham County; that the Certificate of Parole expressly provides that, "under Section 148-61.1 of the Gen-

eral Statutes of North Carolina, the Board of Paroles may at any time revoke this parole and have him returned to prison to serve the unserved portion of his sentence or any part thereof."; that on December 19, 1970, the Petitioner executed a parole agreement, which provides "that the North Carolina Board of Paroles may at any time for reason or reasons satisfactory to itself revoke, modify, or change its terms"; that on April 8, 1970, for reasons satisfactory to the North Carolina Board of Paroles, the North Carolina Board of Paroles issued its Revocation of Parole and Warrant for Arrest of the Petitioner; that the Petitioner was thereupon taken into custody on the permanent Revocation Warrant and recommitted to the North Carolina Department of Correction; and that the Petitioner is presently in custody and committed to the North Carolina Department of Correction at the Caswell County Prison Unit, Yanceyville, North Carolina.

AND IT FURTHER APPEARING TO THE COURT, from the Application for Writ of Habeas Corpus filed herein, and from the contentions of counsel, that Petitioner alleges that he is being illegally held in custody in that he was not provided notice of the parole revocation proceedings in advance of parole revocation; that he was not given the opportunity to hear the evidence presented against him, and confront and cross-examine the persons with evidence against him, present his

own evidence, and have his contentions heard; and that N.C.G.S. 148-61.1 therefore violates the due process requirements of the Fourteenth Amendment to the Constitution of the United States, since it does not provide for the foregoing, or, in the alternative, if N.C.G.S. 148-61.1 is constitutional, it was unconstitutionally applied in the procedures utilized in the revocation of the Petitioner's parole.

BASED UPON THE FOREGOING FINDINGS OF FACT, the Court concludes as a matter of law that N.C.G.S. 148-61.1 is constitutional; that the procedures followed in the revocation of the Petitioner's parole by the North Carolina Board of Paroles conform to the provisions of N.C.G.S. 148-61.1; that the procedures followed in the revocation of the Petitioner's parole by the North Carolina Board of Paroles were constitutional; and that the due process requirements of the Fourteenth Amendment to the Constitution of the United States are fully satisfied by the provisions of N.C.G.S. 148-61.1, and by the procedures followed in this case.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Application for Writ of Habeas Corpus is hereby denied and dismissed; that the Petitioner is not entitled to his release from the custody of the North Carolina Department of Correction; and that the time has not expired that he was required to serve pursuant to the sentence validly imposed on June 13, 1969, in the Alamance County Superior Court,

and that he is lawfully incarcerated.

IT IS FURTHER ORDERED that a copy of this Judgment be forwarded to the Honorable Allan Ivie, Jr., District Solicitor; to the Petitioner, William B. Warren, Post Office Box 217, Yanceyville, North Carolina; to counsel for the Petitioner, Norman B. Smith, Esquire, 816 Southeastern Building, Greensboro, North Carolina; to the Attorney General of North Carolina; to the North Carolina Department of Correction, 835 West Morgan Street, Raleigh, North Carolina; and to the North Carolina Board of Paroles, 831 West Morgan Street, Raleigh, North Carolina.

This the 4th day of December, 1970.

/s/ Marvin K. Blount, Jr.
Marvin K. Blount, Jr.
Judge Presiding

NO. 71SC46PC SEVENTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Term 1971

****

IN THE MATTER OF)
THE IMPRISONMENT OF) From Caswell
WILLIAM B. WARREN)

****

Petition for Writ of Certiorari denied by order of the Court in conference.

This the 2nd day of March, 1971.

NO. 71SC30PC SEVENTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1971

****

IN THE MATTER OF)
THE IMPRISONMENT OF) From Caswell
WILLIAM B. WARREN)

****

Petition for Writ of Certiorari denied by order of the Court in conference,

This the 6th day of April, 1971.

/s/ Moore, J.
Moore, J., For the Court

FILE COPY

FILED
JUL 22 1971

In The

Supreme Court of the United States

October Term, 1970

~~No. 1647~~ 70-322.

In the Matter of the Imprisonment of

William B. Warren,

Petitioner.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1970

No. 1867

In the Matter of the Imprisonment of
William B. Warren,
Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner originally filed a Petition for Writ of Habeas Corpus in the Superior Court Division of the General Court of Justice of Caswell County, North Carolina, which was denied in a Judgment dated December 4, 1970, by the Honorable Marvin K. Blount, Jr., Judge Presiding. Petitioner then filed a Petition for Writ of Certiorari in the North Carolina Court of Appeals which was denied by Order of the Court in Conference on March 2, 1971. The Petitioner then filed an Application for Writ of Certiorari in the Supreme Court of North Carolina which was denied by that Court in Conference on April 6, 1971. Copies of the Judgment of the Caswell County Superior Court, as well as the Orders of the Court of Appeals and Supreme Court of North Carolina are appended to Petitioner's Petition.

From the Judgment below, Petitioner has filed this Petition for Writ of Certiorari to the Supreme Court of North Carolina in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

WHETHER THE PAROLE OF A PAROLEE FROM A STATE CORRECTIONAL INSTITUTION CAN BE REVOKED WITHOUT NOTICE AND HEARING, CONSISTENT WITH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

General Statutes of North Carolina:

N.C.G.S. 148-61.1

"Revocation of parole by Board; conditional or temporary revocation.—(a) The Board of Paroles may at any time, in its discretion, revoke the order of parole of any parolee. The time a parolee is at liberty on regular parole shall not be counted as any portion of or part of the time served on his sentence, and if any parolee shall have his parole revoked, he shall thereafter be returned to the penal institution having custodial jurisdiction over him.

(b) The Board of Paroles may, in its discretion, enter an order revoking a parole conditionally or for a temporary period of time. Upon issuing such order of conditional or temporary revocation, such parolee may be arrested without warrant by any peace officer or parole officer. After such conditional or temporary revocation of parole, the parolee shall be held for a reasonable length of time during which the Board of Paroles shall determine whether or not the conditions of said parole have been violated. If it is determined by the Board of Paroles that the conditions of said parole have been violated, the Board of Paroles may in its discretion revoke the order of parole. If it is determined by the Board of Paroles that there has been no violation of the conditions of said parole, then such parolee or paroled prisoner shall be reinstated upon his original parole."

STATEMENT OF THE CASE

The Petitioner was convicted on June 13, 1969, in the Alamance County Superior Court, upon his plea of guilty to a charge of embezzlement and was sentenced to a term of imprisonment of not less than 2 nor more than 5 years. On December 16, 1969, the North Carolina Board of Paroles issued its Certificate of Parole to the Petitioner paroling him to parole supervision in Durham County, North Carolina. The Certificate of Parole expressly provides that, "under § 148-61.1 of the General Statutes of North Carolina, the Board of Paroles may at any time revoke this parole and have him returned to prison to serve the unserved portion of his sentence or any part thereof." (A. p. 9). On December 19, 1969, the Petitioner executed a parole agreement between the North Carolina Board of Paroles and William B. Warren, Parolee, which expressly provides, "I understand that should I violate parole the Board of Paroles may cause me to be returned to prison without notice and without hearing." (A. pp. 10, 11).

On April 8, 1970, based upon reports submitted to the

Board of Paroles by its professional staff, the Board of Paroles issued its *Revocation of Parole and Warrant for Arrest.* (A. p. 12). Petitioner was thereupon taken into custody and recommitted to the North Carolina Department of Correction for the completion of the sentence from which he was paroled.

ARGUMENT

THE PETITIONER DOES NOT HAVE A CONSTITUTIONAL RIGHT TO NOTICE AND A HEARING ON THE QUESTION OF REVOKING HIS PAROLE, AND, THEREFORE, N.C.G.S. 148-61.1 AS APPLIED TO THE REVOCATION OF PAROLE OF WILLIAM B. WARREN, IS NOT IN VIOLATION OF THE DUE PROCESS REQUIREMENTS OF THE NORTH CAROLINA AND UNITED STATES CONSTITUTIONS.

In 67 C.J.S. § 23, *Pardons*, at page 619, the applicable rule is stated:

> "The parolee has no constitutional right to a hearing on the question of revoking his parole; and, in the absence of a statutory provision for notice and hearing, a parole may be revoked without such notice and hearing, whether authority to revoke is granted in the Governor, the Court or Judge granting the parole, the Board of Parole, Prison Commissioners, or an adult authority."

In the State of North Carolina, the applicable statute, N.C.G.S. 148-61.1, provides:

> "(a) The Board of Paroles may at any time, in its discretion, revoke the order of parole of any parolee . . ."

The leading case on the subject is **ROSE v. HASKINS**, 388 F. 2d 91 (6th Cir. 1968). In **ROSE**, the Court quoted with approval the uniform rule stated in 67 C.J.S. § 23, *Pardons*, and went on to state:

> "The Supreme Court of the United States has held that

the privilege of a probationer is not a right guaranteed by the Constitution, but 'comes as an act of grace to one convicted of a crime and may be coupled with such conditions in respect of its duration as Congress may impose.' In the absence of statutory provision, the probationer is not entitled to a hearing on revocation. ESCOE v. ZERBST, 295 U.S. 490, 492, 493, 55 S. Ct. 818, 819, 79 L. Ed. 1566 (1935); BURNS v. UNITED STATES, 287 U.S. 216, 53 S. Ct. 154, 77 L. Ed. 266 (1932). See also STATE ex rel HARRIS v. RAGEN, 177 F. 2d 303 (7th Cir. 1949)."

Moreover, in ROSE, supra, the Court stated:

"Under Ohio law, the 'trustee' and 'parolee' have privileges, not rights, until they have served their sentences. The Parole Commission may declare a prisoner, who has been paroled, a violator when in its judgment he has violated the conditions of his parole. The Commission has exercised its judgment in this case. It declared Rose a parole violator. It was not required to provide a hearing . . ."

In PEOPLE ex rel JOHNSON v. FOLLETTE, 295 N.Y.S. 2d 565 (1968), the Court stated that:

"A number of cases have held that the Constitution does not even require a hearing in order to revoke parole. See EASON v. DICKSON, 9 Cir., 390 F. 2d 585; ROSE v. HASKINS, 6 Cir., 388 F. 2d 91, cert. dnd. 392 U.S. 946, 88 S. Ct. 2300, 20 L. Ed. 2d 1408; WILLIAMS v. DUNBAR, 377 F. 2d 505. Thus, while it is permissible to make a statutory provision for a hearing, it is not constitutionally required (ESCOE v. ZERBST, 295 U.S. 490, 492-493, 55 S. Ct. 818, 79 L. Ed. 1566) . . ."

When this issue was raised in DUNN v. CALIFORNIA DEPARTMENT OF CORRECTION, 401 F. 2d 340 (9th Cir. 1968), the Ninth Circuit Court of Appeals held that:

"A state prisoner's right to a parole is not one of the rights protected by the United States Constitution . . .

"There is no federally protected constitutional right to counsel or confrontation of witnesses in a parole revocation proceeding. EASON v. DICKSON, 390 F. 2d 585 (9th Cir. 1968); WILLIAMS v. DUNBAR, supra; HYSER v. REED, 115 U.S. App. D.C. 254, 318 F. 2d 225, 239 (1963)."

Similarly, when the issue was presented to the Sixth Circuit Court of Appeals in HINKLE v. OHIO PAROLE AUTHORITY, 419 F. 2d 130 (6th Cir. 1969), that Court held:

"A state is not required to provide for parole, and, if it does, it may stipulate terms and conditions under which it may be granted or revoked. Moreover, the parolee has no constitutional right to a hearing on the reason for revocation of parole. ROSE v. HASKINS, 388 F. 2d 91 (6th Cir. 1968); COX v. MAXWELL, 366 F. 2d 765, 767 (6th Cir. 1966)."

The Tenth Circuit Court of Appeals had an opportunity to review a similar contention in EARNEST v. WILLINGHAM, 406 F. 2d 681 (10th Cir. 1969), and stated that:

"Early release of prisoners, be it mandatory release, parole or probation, and revocation hearings are matters of legislative grace not constitutionally mandated."

The Sixth Circuit Court of Appeals was once again presented with the issue in ALLEN v. PERINI, 424 F. 2d 134 (6th Cir. 1970), and once again concluded that:

"A final question is whether ALLEN was entitled to a hearing on the revocation of his parole . . . This issue was foreclosed adversely to petitioner by the decision of this Court in ROSE v. HASKINS, 388 F. 2d 91 (6th Cir.). See also BARNHART v. MAXWELL, 2 Ohio St. 2d 308, 310, 208 N. E. 2d 752."

In an opinion handed down on April 5, 1971, the Massachusetts Supreme Judicial Council also had an opportunity to review this contention. In BAXTER v. COMMONWEALTH, Mass. , 268 N. E. 2d 670 (1971), the Supreme Judicial Council held that parole is a privilege and that the revocation of this privilege is within the discretion of the Parole Board and, therefore, there is no constitutional right to a hearing before it is revoked.

On April 21, 1971, the Eighth Circuit Court of Appeals once again reaffirmed the proposition that the due process clause of the Fourteenth Amendment does not require that a hearing be granted on revocation of parole. MORRISEY v. BREWER, F. 2d (8th Cir. 1971), 9 Cr. L. 2083 (May 5, 1971).

However, subsequent even to the above cited line of authority, and decided without knowledge of the Petitioner, the Fourth Circuit Court of Appeals (which encompasses the State of North Carolina), decided, on June 10, 1971, *en banc*, the consolidated cases of BEARDEN v. SOUTH CAROLINA, F. 2d (4th Cir., No. 14,079, June 10, 1971) and MIDGETT v. COX, F. 2d (4th Cir., No. 14,197, June 10, 1971). In BEARDEN, the Fourth Circuit Court of Appeals held that:

> ". . . due process and fundamental fairness dictate a holding that within a reasonable period after arrest upon such a warrant the parolee is entitled to notice of his alleged default and opportunity to rebut the same, including the right to be heard pro se before someone representing the Board, and to present voluntary witnesses in his own behalf . . ."

CONCLUSION

The decision of the Fourth Circuit Court of Appeals in BEARDEN v. SOUTH CAROLINA, supra, is in conflict with the decisions of the Sixth Circuit Court of Appeals in ROSE

v. HASKINS, supra, HINKLE v. OHIO PAROLE AUTHORITY, supra, and ALLEN v. PERINI, supra; the Seventh Circuit Court of Appeals in STATE ex rel HARRIS v. RAGEN, supra; the Eighth Circuit Court of Appeals in MORRISEY v. BREWER, supra; the Ninth Circuit Court of Appeals in DUNN v. CALIFORNIA DEPARTMENT OF CORRECTION, supra; the Tenth Circuit Court of Appeals in EARNEST v. WILLINGHAM, supra; and the decisions of the highest courts of many of the states.

In view of the foregoing, the Respondent respectfully joins with the Petitioner and prays that this Court grant a Petition for Writ of Certiorari so as to resolve the conflict now existing between the various circuits.

Respectfully submitted,

ROBERT MORGAN
Attorney General of North Carolina

JACOB L. SAFRON
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

COUNSEL FOR RESPONDENT

Certificate of Parole

STATE OF NORTH CAROLINA

TO THE N. C. DEPARTMENT OF CORRECTION:

William B. Warren, W/M, Age 39, at the June, 1969 Term,
W0663-785-10730-32
Superior Court of Alamance County,
was convicted of Embezzlement

and sentenced to serve 2 - 5 years

After having made a careful investigation of this case, the Board of Paroles is of the opinion that the best interests of the public and of the inmate will be served by his release under supervision at this time.

Therefore, in accordance with the provisions of Section 148-52 of the General Statutes of North Carolina, the Board of Paroles does hereby parole the said William B. Warren under the supervision of the Office of the Board of Paroles or its representatives, upon condition he obey the law and adhere strictly to the parole rules and regulations and the advice of supervising agents.

County of Supervision: Durham

P. I.

Under Section 148-61.1 of the General Statutes of North Carolina, the Board of Paroles may at any time revoke this parole and have him returned to prison to serve the unserved portion of his sentence or any part thereof.

This the 16th day of December, 19 69

BOARD OF PAROLES

Member
Robert Weinstein

Member
Foil Essick

P. B. FORM #101

STATE OF NORTH CAROLINA

PAROLE AGREEMENT BETWEEN THE NORTH CAROLINA BOARD OF PAROLES

AND William B. Warren PAROLEE
W0663-785-10730-32

In accepting this parole I understand that the North Carolina Board of Paroles may at any time for reason or reasons satisfactory to itself revoke, modify, or change its terms. I also understand that I am under the legal custody of the Board of Paroles until duly discharged by the Board. I understand that should I violate parole the Board of Paroles may cause me to be returned to prison without notice and without hearing. In accepting this parole I agree to abide by the following rules:

1. I will report promptly to my parole officer whenever instructed to do so and in the manner prescribed by my parole officer and the Board of Paroles.
2. I WILL NOT USE INTOXICATING BEVERAGES OR NARCOTICS WHILE ON PAROLE. (IT IS UNDERSTOOD THAT NARCOTICS PRESCRIBED BY A LICENSED PHYSICIAN MAY BE USED AS PRESCRIBED.)
3. I will obey all municipal, county, state, and federal laws, ordinances and orders and avoid people and places with bad reputations.
4. I will not leave my county of residence without obtaining permission from my parole officer. I will not leave the State of North Carolina without permission from the Board of Paroles.
5. I will work steadily at an approved job and not change jobs or residence without permission from my parole officer. If I am discharged from my job or evicted from my home, I will notify my parole officer immediately.
6. I will not own or operate any motor vehicle without permission from my parole officer.
7. I will not own or possess any firearms or deadly weapon without permission from my parole officer.
8. I will maintain steady employment and support any persons dependent on me to the best of my ability.
9. I will not visit any place where prisoners are confined or associate or communicate with inmates of penal institutions or persons having a criminal or police record without permission from my parole officer.
10. I will not marry or re-marry without permission from my parole officer.

11. I will not incur any u.. .cessary indebtedness or make any installment purchases or loans without permission from my parole officer.

12. I will allow my parole officer to visit and inspect my home or place of employment at any time and will answer all inquiries from the Board of Paroles or its agents truthfully and to the best of my ability.

13. I will report immediately to my parole officer any incident that might lead to my arrest while I am on parole.

14. I do hereby waive extradition to the State of North Carolina from any state of the United States and also agree that I will not contest any effort by any state to return me to the State of North Carolina.

15. I agree to abide by any special conditions the Board of Paroles deems necessary to the supervision of my case. If I am paroled or transferred to another state, I agree to abide by any parole rules in effect in that state.

I have read or have had read to me the foregoing conditions of my parole. I fully understand them and will strictly follow them.

DATE 12-19-69 SIGNED William B. Hayward

WITNESS [illegible] TITLE Parole Officer

The Board of Paroles realizes that under the American system compulsory church attendance may be regarded as infringement upon the idea of separation of church and state and therefore, does not include this as a specific condition of parole. However, the Board wishes the parolee to know that in its opinion no more important element enters into the proper rehabilitation of the individual than does religion. The Board strongly recommends to the parolee that he or she immediately upon release on parole communicate with a minister, priest, or rabbi of the parolee's choosing and secure the assistance of such person in helping work out the parolee's problems. The Board suggests to the parolee regular church attendance and active membership by the parolee in a church of the parolee's choice.

Ordinarily parole supervision will last at least as long as it would have taken you to complete your sentence by law. However, you must be on parole at least one year before you can be discharged. Very few with a good parole record are required to be on parole more than five years. If your parole is revoked, the time you are on liberty on a regular parole will not count as time served on your sentence.

Revocation of Parole
And Warrant for Arrest

STATE OF NORTH CAROLINA

TO ANY OFFICER AUTHORIZED BY LAW TO MAKE ARRESTS. GREETINGS:

WHEREAS William D. Warren, W/M (NCDC#63-705-10730-32), a parolee of the North Carolina State Prison or its Division, sentenced from Alamance County, in June, 1969 to serve a sentence of 2 to 5 years for the crime of EMBEZZLEMENT, and was thereafter on the 16th day of December, 19 69, granted parole and is now in the legal custody of the Board of Paroles; and

WHEREAS, the Board of Paroles, being informed that this parolee is not adjusting satisfactorily or has violated conditions of parole, and exercising its discretion, deems it for the best interests of society and the parolee that his parole be revoked.

NOW, THEREFORE, the Board of Paroles, by authority of Section 148-61.1 of the General Statutes of North Carolina does hereby revoke the parole of the said WILLIAM D. WARREN, WHITE - MALE, and authorizes and directs any officer authorized by law to make arrests to apprehend and take him into custody and hold him until the arrival of a duly authorized representative of the North Carolina Prison Department, who will take him into custody and return him to the Prison System for the completion of the sentence from which he was paroled.

By authority of Section 148-62 of the General Statutes of North Carolina, the remainder of the sentence from which was paroled is hereby ordered to run with the sentence of which commenced at the term, 19 , of the Court of County.

This the 7 9th day of April, 19 70

BOARD OF PAROLES

By: [signature]
Robert Bruce Jr., Director

LE COPY

Supreme Court, U. S.
FILED
MAR 22 1971
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 70-322

In the Matter of the Imprisonment of
William B. Warren,

Petitioner.

****

ON WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF CASWELL COUNTY,
NORTH CAROLINA

****

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

****

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Telephone: 919-275-8603

Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 322

In the Matter of the Imprisonment of
William B. Warren,

Petitioner.

****

PETITION FOR REHEARING OF
PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF CASWELL COUNTY,
NORTH CAROLINA

****

NOW COMES William B. Warren, the petitioner in the above-entitled proceeding, and through his undersigned counsel respectfully shows unto the Court:

On June 29, 1972, the Court entered the following order in this proceeding:

> The petition for a writ of certiorari is denied. Mr. Justice Douglas would grant certiorari, vacate the judgment below, and remand the case for further consideration in light of his dissenting opinion in Morrissey v. Brewer, ____ U.S. ____ (1972).

The majority opinion in Morrissey v. Brewer, decided June 29, 1972, set out as minimum due process requirements for parole revocation, (1) prior notice of a

hearing, (2) written statement of the claimed violations of parole, (3) a hearing near the place of the alleged parole violation, (4) disclosure to the parolee of the evidence against him, (5) opportunity for the parolee to be heard in person and to present witnesses and documentary evidence, (6) the right of the parolee to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), (7) a "neutral and detached" hearing body, and (8) a written statement by the fact finders as to evidence relied on and reasons for revoking parole.

In the dissenting opinion of Mr. Justice Douglas in Morrissey v. Brewer, additional requirements for revocation of parole were proposed, including (1) right to counsel, (2) disqualification of the parole officer as a hearing officer (in those jurisdictions where he has prosecutorial and police functions), (3) an unqualified right of confrontation, and (4) right to remain at liberty until the final revocation order following the hearing is given by the parole board.

It is respectfully submitted that the facts in the instant petition mandate relief under the majority opinion in Morrissey v. Brewer. Here, as expressly authorized by N.C.G.S. 148-61.1, the North Carolina Board of Paroles entered an ex parte order revoking petitioner's parole and ordering his arrest; petitioner was thereupon taken into custody and recommitted to the North Carolina Department of Correction. There was no notice and

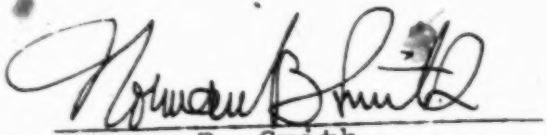
hearing before the parole revocation. Here, unlike the cases consolidated in Morrissey v. Brewer, there is no allegation that a revocation hearing was given after petitioner was returned to prison; in fact there was no hearing at any time. Here petitioner made no admission of parole violation that was included in the parole officer's report, so that the Court's suggestion in Morrissey v. Brewer that the admissions might form a sufficient basis for revocation, is not applicable in the instant cause. This petitioner could not have made an admission of violating his parole, because to this day he has not been informed of the reasons for the revocation of his parole!

The revocation of petitioner's parole was on April 8, 1970, and the habeas corpus hearing in Superior Court, which is here for review, was on October 7, 1970; it cannot be contended that this hearing was a substitute for a revocation hearing, since the reasons for the revocation and facts to support these reasons were not a part of that proceeding, and in the habeas corpus proceeding the only issues were whether the state had the right to revoke petitioner's parole without notice or hearing.

The decision of the lower court cannot be sustained when viewed in light of the majority opinion in Morrissey v. Brewer.

WHEREFORE, petitioner petitions the Court for a rehearing of his petition for

writ of certiorari, as provided in Rule 58.2 of the Rules of the Supreme Court of the United States.



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Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 322

In the Matter of the Imprisonment of
William B. Warren,

Petitioner.

****

CERTIFICATE OF COUNSEL

****

The undersigned counsel for petitioner hereby certifies, in accordance with Rule 58.2 of the Rules of the Supreme Court of the United States, that the foregoing petition for rehearing of petition for writ of certiorari in this proceeding is presented in good faith and not for delay. The undersigned further certifies that the grounds for the petition consist of intervening circumstances of substantial or controlling effect, and substantial grounds available to petitioner although not previously presented, in that the denial of petition for certiorari appears to have been erroneous and inconsistent with the majority opinion in Morrissey v. Brewer, ____ U.S. ____ (1972), which was rendered the same day that petition for certiorari was denied in this cause.

Howard B. Smith

Counsel for Petitioner
Norman B. Smith
Smith, Patterson, Follin
& Curtis

CERTIORARI DENIED